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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

COMMERCIAL CASUALTY INSURANCE CO.,
Petitioner,
vs.
MARY ROBERTS,
Respondent.
No. 278.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The respondent, Mary Roberts, adopts the statement of facts set out in the Petition for Writ of Certiorari.

ARGUMENT.

The petitioner, Commercial Casualty Insurance Co., assigns as the reason relied on for the allowance of the writ of certiorari that the Circuit Court of Appeals decided an important question of Kentucky law in a way probably in conflict with the applicable Kentucky decisions. The court below held that the hotel suite occupied by the deceased insured was a building as that term was used in an accident insurance policy providing for double indemnity in the event the insured came to his death as the result of the destruction by fire of a building while the insured was therein. The court below further held that where the result of fire is such as to require substantial structural changes in the damaged premises and to render them untenantable for a substantial period of time, there has been destruction within the meaning of the policy provisions.

The case presented calls for the construction of a contract of insurance. There is no rule of law here applicable as established by Kentucky decisions other than the one which requires an insurance policy to be construed most strongly against the insured. There is no Kentucky case, so far as we are advised, undertaking to determine the meaning of the word "destroy" as used in an insurance policy in the connection the word is here used.

Counsel for the petitioner takes two Kentucky cases, one involving a lease and the other involving a statute and undertakes to argue from these two cases that the word "destroy" has a settled judicial meaning in Kentucky equivalent to annihilation.

In Davis v. Parker, 200 Ky. 847, 255 S. W. 836, the court was called on to construe a lease providing that if the building should be destroyed in such a manner as to render it untenantable, the lessors would immediately replace it

in the same condition. In this case the court merely held that all of the language of the lease showed an intention to express something short of total destruction.

The other case upon which petitioner relies is that of Louisville & Nashville R. R. Co. v. Commonwealth, 190 Ky. 78, 226 S. W. 113. Here the court is called upon to construe a statute containing the word "destroyed." As used in this statute the court held that the word "burned" and the word "destroyed" have reference to a state of case in which a railroad station has been rendered wholly unfit for its intended use by fire or other cause. This opinion then states, "If a station has been 'burned' and thereby totally destroyed or injured to such extent as to make it wholly unfit for use, it seems clear that a new station must be built to take its place . . ." Further in the opinion, we find this opinion. "The words 'burned' and 'destroyed' are in common usage, and when applied to buildings generally mean that the building has been made completely useless for the purpose intended."

It would seem that as used in this connection the word "destroyed" means something less than total annihilation and that the statutory requirement was satisfied where the building was rendered unfit for the purpose intended.

Another statute of Kentucky wherein the word "destroyed" is found has to do with the landlord and tenant relationship. KRS 383.170 provides that unless the contrary is expressly provided for in the written contract, the agreement of a lessee that he will repair or leave the premises in repair, shall not bind him to erect similar buildings if without his fault or neglect, the buildings are destroyed by fire or other casualty. In three cases, Winter v. Taylor, 224 Ky. 827, 7 S. W. 2d 209; Sun Insurance Office v. Varble, 103 Ky. 758, 46 S. W. 486; and King & Metzger v. Cassel, 150 Ky. 537, 150 S. W. 682, the Kentucky Court of

Appeals held that the word "destroy" as used in this statute does not mean total destruction, but includes any cases where fire or other casualty substantially injures the premises.

We, therefore, see that a review of the Kentucky cases indicates only that the word "destroy" will be given a meaning according to the text in which it is used. The degree of destruction required will vary as required to give effect to the intention of the parties to a contract or to the intention of the legislature where a statute is involved.

The court below did not decide any question of Kentucky law, but merely construed an insurance policy in accordance with the settled rule of construction in Kentucky that in case of ambiguities, doubts should be resolved against the insurance company.

Respectfully submitted,

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